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No.

IN THE

Supreme Court of the United States

OCTOBER TERM—1976

76-1621

SENATOR JOHN L. McCLELLAN, *et al.*,

Petitioners,

vs.

ALAN McSURELY and MARGARET McSURELY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MORTON STAVIS,
744 Broad Street,
Newark, New Jersey 07102.

NANCY STEARNS,
c/o Center for Constitutional Rights,
853 Broadway,
New York, New York 10003.

CHARLES N. MASON, JR.,
1459 Roxanna Rd., N.W.,
Washington, D.C. 20012.

Attorneys for Respondents.

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COUNTER-STATEMENT OF THE CASE

The government's statement omits two of the most critical facts in this case which indeed make it so "unusual," the term used by Judge Leventhal (34a).

First, at page 5 of the government's petition, there is a failure to note that prior to the time that Mr. Brick took the 234 documents to Washington on October 12, 1967, he had learned that the United States District Court on September 4, 1967, had already found that the seizure by Kentucky officials had been under an unconstitutional statute and had ordered the documents held in "safekeeping." Indeed, on October 9, 1967, Mr. Brick had examined the District Court's order to that effect. Three days later, in direct violation of the court order he had just read, he took the 234 documents, without notice to McSurelys.

Secondly, the government's statement completely fails to note that among the 234 documents were clearly personal items such as, among other things, a love letter which Mr. Brick admitted he took although, having inspected the documents, he knew at the time that the letter and "many" of the other documents were not "needed at all" for the performance of his duties for the United States Senate. Some of this personal material was then displayed, at least to Senator McClellan, and retained by the Senator. 1/

1/ The letter was from columnist Drew Pearson and was addressed "Dearest Cucumber." There was also a personal diary of Margaret McSurely and other intimate correspondence, some of which referred to or emanated from Mr. Pearson.

As stated by Judge Leventhal in his opinion, "[t]his case is unusual because Brick in testimony at the McSurelys' contempt trial conceded that when 'he went to Pikeville to examine the documents in the Court House,' he looked through the papers and books and determined there were 'many' items that he 'didn't need at all,' including a letter addressed to plaintiff Margaret McSurely, as 'Dearest Cucumber,' from a prominent newspaper columnist." (34a-35a)

By the two omissions referred to above the government's statement seeks to sanitize this record and make it appear that the case involved a legitimate exercise of investigatory power by a Senate committee employee. In fact, what the case involves is an admitted abuse of legislative investigatory power.

The main legal position of the government has as little validity as its distorted view of the facts. It is literally that even if conduct which intrudes upon the rights of a private citizen is admittedly not necessary for the performance of legislative duties, a mere assertion that the act was undertaken pursuant to a broad penumbra of "preliminary investigative activities" is enough to bring into play the immunity of the Speech or Debate Clause. That is not--and cannot be--the law.

REASONS WHY THE PETITION SHOULD BE DENIED.

I.

The first of the government's "questions presented" reads:

> "1. Whether the Speech or Debate Clause bars a private suit for damages against a Senator and his aides, alleging that some of their investigatory activities, in connection with a subject on which legislation may be had, were improper or unconstitutional."

The government baldly argues that "[t]he court's authority is at an end once it has determined that the conduct in question is related to a legitimate legislative function" (underscoring supplied; G. Pet. 13). Although on some issues the lower court was equally divided, all of the judges of the court below rejected the foregoing argument. 2/

2/ Judge Wilkey, speaking for himself and the four judges who did not agree with Judge Leventhal's Fourth Amendment analysis, agreed that the Speech or Debate Clause did not provide the immunity claimed by the government. See Judge Wilkey's opinion, 55a, fn. 3, which reads as follows:

> "The majority states the principle, which we endorse, that investigative activity is so essential to the legislative process that it is ordinarily absolutely privileged, provided, of course, that the basic conditions of authorization and pertinency are established. Maj. op. at 17-19. But this absolute privilege can be lost where the investigator engages in a search and seizure in violation of the Fourth Amendment. Dombrowski v. Eastland, 387 U.S. 82 (1967), cited by the majority at 19.

The government's contention here is indeed exactly the argument presented to this Court by Senator Brewster, who urged "that the Clause [Speech or Debate] protected from executive or judicial inquiry all conduct 'related to the due functioning of the legislative process,'" United States v. Brewster, 408 U.S. 501, 513 (1972). This Court rejected that argument and said:

> "In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process." (Emphasis in original; id. at 515.)

The Court said further:

> "The sweeping claims of appellee would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office." Id. at 520.

With respect to the first "question" propounded by the government, the decision below is clearly correct upon two independent considerations:

a) Where a legislator or a legislative employee purports to exercise the investigative power of Congress, the question of whether the conduct may fairly be deemed to have been authorized by Congress and whether Congress had the power to give such authorization necessarily comes to the fore. Thus, this Court noted in Servicemen's Fund, "although the power to

investigate is necessarily broad it is not unlimited. Its boundaries are defined by its source." 421U.S. at 504. And when those boundaries are crossed, the conduct is perforce non-legislative, regardless of the forms employed.

Servicemen's Fund emphasized that even as to the issuance of a subpoena--plainly a facially legislative device--the question of legislative jurisdiction remained open because "Congress is not invested with a general power to inquire into private affairs," and "the subject of the inquiry must be one of which legislation could be had," 421 U.S. at 504.

The "unusual" feature of this case which gives it a hornbook quality is that a key defendant, who was also an agent of Senator McClellan, admitted that he was acting outside the performance of his legislative duties.

Officious meddling into Margaret McSurely's private and intimate correspondence is, just like taking a bribe, "obviously no part of the legislative process or function," United States v. Brewster, supra, at 526.

b) Brewster, it should be noted, involved a claim of immunity for acts "related" to conduct which was at the core of legislative activity, i.e., voting in respect to postal laws. Here the government claims absolute immunity for conduct which, at most, is related to peripheral legislative activities, namely, anything that may be encompassed within the broad spectrum of "preliminary investigative activity."

This Court has consistently drawn a distinction between conduct defined as merely "relating to the legislative process," Brewster, supra, 408 U.S. at 515, and conduct which is "an integral part of the deliberative and communicative process," Gravel v. United States, 408 U.S. 606, 625 (1972). In short, there is a difference between a Senator's making a speech on the floor of the Senate and his engaging in the myriad of activities every Member of Congress undertakes which are not at the heart of the legislative process, Brewster, at 516. And there is a difference between issuance of a subpoena, as in Eastland v. United States Servicemen's Fund, supra, 421 U.S. 491 (1975), and acts done in the course of a preliminary investigation. It could never be seriously contended that everything done by a Congressional investigator as part of a preliminary investigation is "an indispensable ingredient of law making," Servicemen's Fund, at 505.

And in Servicemen's Fund this Court left no doubt but that the issuance of a subpoena was markedly different from the circumstance where Members of Congress "themselves seized property or invaded the privacy of a citizen. 421 U.S. at 507.

A preliminary investigation is not a subpoena. If there is any line which distinguishes conduct which merely "relates" to the legislative process from conduct which is an "integral part" of that process, surely there must be a distinction between a subpoena and a preliminary investigation.

Investigative activity can include almost any

kind of conduct: Search, seizure, electronic surveillance, assault, blackmail, theft of documents, bribery, extraction of a confession by torture, false imprisonment, sexual seduction, breaking into a psychiatrist's office, and every conceivable technique--fair or unfair, lawful or unlawful--that investigators employ.

A subpoena is a formal exercise of the compulsory process in an investigation. It is a well-defined, observable exercise of power, generally requiring specific authority by a Senator or Member of Congress. A subpoena's regularity and scope can be, and often are, subjected to judicial scrutiny if an effort is made to enforce it against a recalcitrant witness.

"Preliminary investigation" is, by contrast, any undefined activity which a Congressional employee claims he is engaging in in the hope of obtaining information. It cannot be described by scope or content. Short of a lawsuit, such as in this case, there is no way of testing the lawfulness of the conduct.

The government argues that "an immunity that would protect only when no wrong has been committed is no immunity at all" (G. Pet. 14). That may be so and precisely because of that fact immunities are not so easilydistributed to every staff employee or legislator who claims to be engaged in amorphous and indefinable "preliminary investigative activity"--particularly where he concedes that he was not performing a legislative function. And that is why the opinions of both Judges Leventhal and Wilkey agree that

violations of Constitutional rights in the course of the exercise of preliminary investigatory activites are not immune under the Speech or Debate Clause and that of course is the specific holding of Dombrowski v. Eastland, 387 U.S. 82 (1967).

II.

At page 16 of its petition the government argues that the decision of the Court of Appeals is inconsistent with Dombrowski v. Eastland, supra, because allegedly the record is silent on the involvement of defendants McClellan, Adlerman, and O'Donnell.

We observe at the outset that this issue is hardly encompassed in the "questions presented." Beyond that, however, the issue is wholly beyond the pleadings before the District Court, 3/ or

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3/ The "Motion to Dismiss or in the Alternative for Summary Judgment," as filed in the District Court by the government, states the following as its "grounds":

1. Defendants are immune from actions for damages where, as here, it is clear that their conduct was within the sphere of legislative activity.

2. The complaint fails to state a claim upon which relief can be granted against defendants who were a U.S. Senator or employees of the Senate at all times material to this cause.

[Footnote continued on next page.]

the argument before the Circuit Court. 4/

Aside from the misstatement of fact in the government's footnote 14, 5/ we find it difficult to believe that the Court would reach for an issue which had never been presented or considered below, let alone pleaded. Cf., Paschall v. Christie Stewart, 414 U.S. 100 (1973).

[Footnote 3 continued:]

3. Plaintiffs are barred by collateral estoppel from re-litigating issues previously settled by the judgment in United States v. Alan McSurely and Margaret McSurely, Cr. Nos. 1376-69 and 1377-69.

The government's Motion for Reconsideration of Order filed June 13, 1973, or, Alternatively, for Certification Pursuant to 28 U.S.C., §1292(b)" supplies no additional grounds and simply repeats the claim that "the defendants are officially immune with respect to the allegations in the complaint against them."

4/ Inspection of the briefs filed by the government in the Circuit Court reveals that the issue here proffered was never offered to the Circuit Court.

5/ Petitioners' affidavits could hardly be considered as "denying involvement" and respondents did indeed introduce affidavits which disputed every material fact offered by petitioners.

III.

The government contends that "as a matter of law, Brick committed no improprieties warranting imposition of civil liability." This contention is essentially based on the argument that even if the prior conduct of state officers was illegal, there was no impropriety in Senate investigators employing the fruits thereof if they were handed to them on a "silver platter." The government here seeks to encapsulate Judge Wilkey's argument.

The flaw in this contention is fully demonstrated in the supplement to Judge Leventhal's opinion.

What distinguishes this case from those cited by the government (e.g., United States v. Calandra, 414 U.S. 338 [1974], United States v. Janis, 428 U.S. 433 [1976]) is that here the McSurelys, victims of the unconstitutional seizure, had gone to court, sought judicial relief against the initial seizure, and obtained a court order requiring the safekeeping of the documents.

It is inconceivable that Calandra or any other case could be interpreted to hold that 1) even where the aggrieved citizen has gone to court to obtain relief from an unlawful seizure, 2) has obtained an adjudication that it was indeed unlawful, and 3) has an order of a court that the items be kept in safekeeping, that nevertheless the Senate employee does not commit an independent violation when he surreptitiously obtains the documents which were supposed to be in safe

keeping. To so hold makes a mockery of the judicial process, the only remedy available to the citizen who has been victimized by unlawful search and seizure. Mr. Justice Powell in his opinion in Calandra emphasized that the citizen who was the object of an unlawful search was not "left remediless." "He may," said Mr. Justice Powell, "seek the return of the illegally seized property," 414 U.S. at 354, n. 10, and if he does, and obtains a court order for the safekeeping of his property, can it be seriously suggested that no new violation of his rights has been effected when another official surreptitiously takes the seized property behind the back of the court?

Thus, Judge Leventhal's opinion says quite correctly:

"[O]ur ruling is based on the investigator's own unlawful activity--the inspection and transportation of copies of materials in violation of a three-judge federal district court order.

"We need not be detained by Judge Wilkey's traverse of cases like Calandra, Elkins and Sherwin. What makes all the difference in the world is that in this case a Federal court did issue an order, did make a determination that papers and other material had been seized by state authorities under an unconstitutional statute, did assert custody over the seized documents, and that investigator Brick examined them and took copies without resort to the procedures of the Federal court that had intervened and asserted

control over the materials. It would not be analysis but legerdemain, to characterize Brick's actions in violation of a court order as part of a subsequent 'transfer' inherently unreachable under the Fourth Amendment. The case is entirely different from Calandra.

"We do not think it can be seriously argued that conduct like Brick's, compounding his own inspection of documents with transportation to permit access by others, fails to state a Fourth Amendment violation in a case where there has been a court order that establishes a custodian with possession (pending appeal) of papers seized unlawfully from plaintiffs, and provides that any other access requires court approval (in the absence of permission by plaintiffs).

"Judge Wilkey misses the point in his argument (e.g., at p. 29 ff.) that Brick's activity involves no legal injury not already wrought by the state officials. Even assuming for discussion plaintiffs had no valid claim against any state officials for the seizure from their home, perhaps on the theory that the taking was under a warrant to enforce a state sedition statute not yet held unconstitutional, plaintiffs may nevertheless maintain anaction against Brick for his inspection and taking of papers after the federal court held invalid both the state statute and the continued retention of the seized materials by the state prosecutor except as a court custodian." (46a-48a)

IV.

Finally, the government objects to that portion of the order which required further proceedings concerning the dissemination of the documents outside of Congress. The government supports its contentions by two misstatements of the record:

1. "There was no such order to affirm." (G. Pet. 19)

Since the District Court's order denied in its entirety the government's motion to dismiss or alternatively for summary judgment, everything that was in the pleadings was left in the case. Therefore, when the Circuit Court affirmed the order of the District Court insofar as it required further proceedings concerning the dissemination of documents outside of Congress, it was in fact affirming what the District Court had ordered.

2. "Respondents' allegations of dissemination were made for the first time in the court of appeals; since the complaint did not make any allegations concerning dissemination, the district court had no entered any pertinent order." (Ibid.)

Paragraph 19 of the Amended and Supplemental Complaint includes, among other allegations, the following:

> "Thereupon, defendant Brick did in fact and without the knowledge of the plaintiffs, inspect the private and personal

> correspondence and papers of the plaintiffs, obtained photographs and copies of 242 items, and took them back to Washington, D.C., where he exhibited them to persons whose names are unknown to the plaintiffs, to the damage and embarrassment of the plaintiffs."

Of course the complaint did not allege--and was not required to allege--that the dissemination was to the Internal Revenue Service. The relationship between the Senate Committee and the I.R.S. was a deep, dark secret until recently revealed. But certainly the complaint included within its compass the dissemination of the papers to persons outside Congress.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: August 17, 1977.

Respectfully submitted,

MORTON STAVIS
744 Broad Street
Newark, N. J. 07102

NANCY STEARNS
c/o Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

CHARLES N. MASON, JR.
1459 Roxanna Rd., N.W.
Washington, D.C. 20012

Attorneys for Respondents